

Larry A. Hammond, 004049
Anne M. Chapman, 025965
OSBORN MALEDON, P.A.
2929 N. Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000
lhammond@omlaw.com
achapman@omlaw.com

John M. Sears, 005617
P.O. Box 4080
Prescott, Arizona 86302
(928) 778-5208
John.Sears@azbar.org

Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,)	No. P1300CR20081339
)	
Plaintiff,)	Div. 6
)	
vs.)	BENCH MEMO REGARDING
)	BURDEN OF PROOF
STEVEN CARROLL DEMOCKER,)	INSTRUCTION IN
)	PRELIMINARY INSTRUCTIONS
Defendant.)	PROPOSED BY THE DEFENSE
)	
)	
)	(Oral Argument Requested)

Defendant Steven DeMocker, by and through undersigned counsel, hereby provides this memorandum to the Court regarding the burden of proof instruction in the defendant's proposed preliminary jury instructions. This motion is based upon Mr. DeMocker's rights to due process, equal protection, counsel, a fair trial and appeal, freedom from double jeopardy, and freedom from cruel and unusual punishment under

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 MAY 10 AM 11:03 ✓

JEANNE HICKS, CLERK

BY: Heather Figueroa

1 the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States
2 Constitution and under the Arizona Constitution, Article 2, Sections 1, 2, 3, 4, 8, 10, 11,
3 13, 15, 24, 32 and 33, as well as the authorities cited in the following Memorandum of
4 Points and Authorities.

5
6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 On April 20, 2010, this Court ordered the parties to provide preliminary jury
8 instructions to the Court and counsel by April 29, 2010. The defendant filed his
9 proposed preliminary instructions on this date. On May 4, 2010 the State filed proposed
10 instructions but did not include any preliminary instructions.¹ As the State has not
11 proposed any alternative instructions and has not objected to those proposed by the
12 defense, this Court should provide the proposed preliminary jury instructions offered by
13 the defense to the jury.²

14
15 The Arizona Supreme Court reviews de novo whether jurors are properly instructed.
16 *State v. McCray*, 218 Ariz. 252, 258 ¶ 25, 183 P.3d 503, 509 (2008). It reviews a trial
17 courts jury instructions as a whole to determine whether the jury received the
18 information necessary to arrive at a legally correct decision. *State ex rel. Thomas v.*
19 *Granville (Baldwin)*, 211 Ariz. 468, 471 ¶ 8, 123 P.3d 662, 665 (2005). And the Court
20 reviews for abuse of discretion “whether the trial court erred in giving or refusing to
21 give requested jury instructions.” *Id.*

22 **1. Preliminary RAJI 19, Presumption of Innocence and Burden of Proof, Does**
23 **Not Protect Mr. DeMocker’s Constitutional Rights in This Capital Case**

24 The defense has proposed a modification to the Preliminary RAJI 19 on burden of
25 proof and presumption of innocence as follows:

26 ¹ The defense will separately file objections to the State’s proposed instructions.

27 ² There was a typographical error in the Presumption of Innocence and Burden of Proof Instruction proposed by
the defense in referring to the “government” as opposed to the “state.”

1
2 *The State has charged the defendant with a crime. The charge is*
3 *not evidence against the defendant. You must not think the defendant is*
4 *guilty just because the defendant has been charged with a crime. The*
5 *defendant has pled "not guilty". The State must prove every part of the*
6 *charge beyond a reasonable doubt.*

7 *The law does not require a defendant to prove innocence. Every*
8 *defendant is presumed by law to be innocent.*

9 *The State has the burden of proving the defendant guilty beyond a*
10 *reasonable doubt. This means the State must prove each element of each*
11 *charge beyond a reasonable doubt.*

12 *Proof beyond a reasonable doubt is proof that leaves you firmly*
13 *convinced of the defendant's guilt. It is not required that the governments*
14 *prove guilt beyond all possible doubt. A reasonable doubt is a doubt*
15 *based upon reason and common sense and is not based purely on*
16 *speculation. It may arise from a careful and impartial consideration of all*
17 *the evidence, or from lack of evidence. If after a careful and impartial*
18 *consideration of all the evidence, you are not convinced beyond a*
19 *reasonable doubt that the defendant is guilty, it is your duty to find the*
20 *defendant not guilty. On the other hand, if after a careful and impartial*
21 *consideration of all the evidence, you are convinced beyond a reasonable*
22 *doubt that the defendant is guilty, it is your duty to find the defendant*
23 *guilty.*

24 *In deciding whether the defendant is guilty or not guilty, do not*
25 *consider the possible punishment.*

26 As previously detailed by the defense, research from the Capital Jury Project
27 (hereinafter referred to as CJP) studied results from actual capital jurors resulted in
28 profound documented deviations between what capital jurisprudence requires and what
actual capital jurors believe. Bowers and Foglia, *Still Singularly Agonizing: Law's*
Failure to Purge Arbitrariness from Capital Sentencing, 30 Crime Law Bulletin 51
(2003). The data demonstrates that death-qualified jurors do not believe in the
presumption of innocence. They believe much more strongly that "where there is
smoke, there is fire." They are extremely distrustful of defense lawyers and view

1 everything they have to say with a great deal of skepticism. On the other hand, they are
2 extremely receptive to the prosecution and its witnesses – especially police officers –
3 and believe them. Death-qualified jurors do not believe in Due Process guarantees,
4 such as requiring the prosecution to bear the burden of proof beyond a reasonable doubt.
5 They are highly suspicious of experts called by the defense. In short, because death
6 qualified jurors are the least representative of the community as a whole and are the
7 jurors least likely to give a criminal defendant the benefit of the doubt, this instruction is
8 necessary in this case.

9 The following language has been removed from the RAJI, “defendant’s plea of
10 “not guilty” means that the.” It is not the defendant’s plea that requires the State to
11 meet its burden of proof, rather it is a presumption of the law.

12
13 The following language is also removed from the RAJI:

14 In civil cases, it is only necessary to prove that a fact is more likely
15 true than not or that its truth is highly probable. In criminal cases such as
16 this, the State’s proof must be more powerful than that. It must be beyond
a reasonable doubt.

17 There are very few things in this world that we know with absolute
18 certainty, and in criminal cases the law does not require proof that
19 overcomes every doubt. If, based on your consideration of the evidence,
20 you are firmly convinced that the defendant is guilty of the crime charged,
21 you must find him/her guilty. If, on the other hand, you think there is a
real possibility that he/she is not guilty, you must give him/her the benefit
of the doubt and find him/her not guilty.

22 As an initial matter, the sentence “There are very few things in this world that we
23 know with absolute certainty, and in criminal cases the law does not require proof that
24 overcomes every doubt.” is added to the language from *Portillo*, 182 Ariz. 592, 596
25 (1995), and is confusing, given the remainder of the instruction. Furthermore, this is not
26 a civil case and there is no reason to potentially mislead or confuse jurors with language
27

1 about the standards of proof from a civil case, which is not what they are to rely on in a
2 criminal case.

3
4 The following language, from the Ninth Circuit Criminal Jury Instructions 3.5, as
5 amended, has been proposed by the defense.

6
7 *It is not required that the State prove guilt beyond all possible doubt. A*
8 *reasonable doubt is a doubt based upon reason and common sense and is*
9 *not based purely on speculation. It may arise from a careful and impartial*
10 *consideration of all the evidence, or from lack of evidence. If after a*
11 *careful and impartial consideration of all the evidence, you are not*
12 *convinced beyond a reasonable doubt that the defendant is guilty, it is*
13 *your duty to find the defendant not guilty. On the other hand, if after a*
14 *careful and impartial consideration of all the evidence, you are convinced*
15 *beyond a reasonable doubt that the defendant is guilty, it is your duty to*
16 *find the defendant guilty.*

17 This language is less confusing for jurors than that from the RAJI and
18 makes clear the burden of proof issues findings may also be based on lack of
19 evidence, which is a critical issue in this case.

20 For these reasons, and because the State has offered no alternative nor
21 objected to the proposed instruction, the Court should offer this instruction
22 regarding the burden of proof.

23 CONCLUSION

24 The defense requests that the Court provide the jury with the defendant's
25 proposed preliminary jury instructions filed on April 29, 2010. These proposed
26 instructions are based on the Defendant's rights to due process, equal protection,
27 counsel, a fair trial and appeal, freedom from double jeopardy, and freedom from cruel
28 and unusual punishment under the Fourth, Fifth, Sixth, Eighth and Fourteenth
Amendments to the United States Constitution and under the Arizona Constitution,

1 Article 2, Sections 1, 2, 3, 4, 8, 10, 11, 13, 15, 24, 32 and 33, and the authorities cited
2 herein.

3 RESPECTFULLY SUBMITTED this 10th day of May, 2010.

4
5 By: 

John M. Sears
P.O. Box 4080
Prescott, Arizona 86302

8 OSBORN MALEDON, P.A.
Larry A. Hammond
Anne M. Chapman
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793

11 Attorneys for Defendant

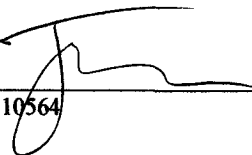
12
13 **ORIGINAL** of the foregoing hand delivered for
14 filing this 10th day of May, 2010, with:

15 Jeanne Hicks
16 Clerk of the Court
17 Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

18 **COPIES** of the foregoing hand delivered this
19 this 10th day of May, 2010, to:

20 The Hon. Thomas B. Lindberg
21 Judge of the Superior Court
22 Division Six
120 S. Cortez
23 Prescott, AZ 86303

24 Joseph C. Butner, Esq.
25 Prescott Courthouse basket

26 
27 310564